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IN THE

Supreme Court of the United States

October Term, 1961.

No. 709.

B. NATHANIEL RICHTER and ELWOOD S. LEVY,

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 709.

B. NATHANIEL RICHTER AND ELWOOD S. LEVY,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO BRIEF OF THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Reply Argument.

The Government in its Brief in Opposition to the Petition for Certiorari implies that Petitioners failed to argue in the District Court that jurisdiction was based on the "Act of Congress" criterion of 28 U. S. C. 1346(a)(2). Petitioners filed two briefs in the District Court. The initial brief cited Section 12(o) of the RUIA as the determinative statutory provision (3), and Petitioners devoted a substantial portion of both their initial brief (4-16) and their reply brief (1-4, 5-10, 17-20, 36-41) in the District Court to the point that for Tucker Act jurisdictional purposes this case must be characterized as one "founded upon an act of Congress" since it involves the interpretation and application of Section 12(o) of the RUIA and

involves a demand for payment back from the United States of funds paid to it under color of the RUIA. For instance, at pages 14 and 15 of their initial brief filed in the District Court Petitioners stated that:

> "The term 'founded on an Act of Congress' has been given a technical construction by the case law that, in certain situations, is possibly somewhat broader than might be otherwise immediately apparent. Since the instant action seeks a payment out of the Treasury of moneys previously paid the United States pursuant to or under color of an Act of Congress, it is, for Tucker Act jurisdictional purposes, a claim founded upon an Act of Congress."

At pages 15 and 16 of the same brief Petitioners stated:

> "A determination of the instant case on its merits requires an interpretation of the provisions of Section 12(o) of the Railroad Unemployment Insurance Act. This is the section pursuant to which the original payments were made to the United States. . . . The government's position rests on its interpretation of the Railroad Unemployment Insurance Act and the 'correct decision' of this case depends on the construction of 'that Act'. *Cohens v. Virginia, supra.* Since the claim of the plaintiffs is dependent upon the application or interpretation of an Act of Congress, it is, for Tucker Act jurisdictional purposes, a claim founded upon an Act of Congress."

Consistent with modern Federal pleading practice, the complaint supports Petitioners' jurisdictional allegations. The principle of *Gully v. First National Bank*, 299 U. S. 109 (1936) pertains to Federal Question jurisdiction of the District Courts and has never been applied as a standard of Tucker Act jurisdiction. In the *Gully* opinion itself,

Justice Cardozo pointed out (299 U. S. 109, 117) the danger of transposing the judicial gloss ascribed to a particular term in one context to a different context in which the policy considerations differ.

Respectfully submitted,

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March 15, 1962